STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,	:	
	:	
Complainant,	:	
	:	
v.	:	**Docket No. 01-0078**
	:	
Commonwealth Edison Company,	:	
	:	
Respondent.	:	
	:	
Complaint regarding wrongful refusal to Provide customer-specific customer transition Charges.	:	

REPLY BRIEF OF AMERITECH ILLINOIS

Illinois Bell Telephone Company ("Ameritech Illinois") filed this case against Commonwealth Edison Company ("ComEd"), alleging that ComEd had violated various provisions of the Public Utilities Act by failing to provide it with individualized customer transition charges ("CTCs") for certain Ameritech Illinois facilities. These facilities were governed by an Electric Service Contract ("Agreement") between the companies.

Ameritech Illinois established in its opening brief that ComEd's conduct violated the plain language of its Rate CTC tariff. Ameritech Illinois also established that the Agreement included 126 facilities, and it outlined a method for calculation of its damages using information in ComEd's tariffs and billing systems.

ComEd's response, although lengthy, is primarily an exercise in grasping at straws. To hide the weakness of its legal arguments, ComEd focuses on hair-splitting distinctions in the formulation of governing legal standards and engages in repeated distortion of Ameritech Illinois' arguments and the record.

As explained below, the Agreement is a "customer-specific electric service contract" under the Rate CTC tariff. Ameritech Illinois thus is entitled to customer-specific CTCs for all facilities covered by the Agreement. Moreover, Ameritech Illinois would not violate the Agreement if it took service from ComEd on an unbundled basis, so that it would not have to return any payments it previously received from ComEd under the Agreement. The Agreement included 126 facilities, and the Commission should order ComEd to calculate the extent to which it overcharged Ameritech Illinois for service at each facility.

I. THE CONTRACT IS CUSTOMER-SPECIFIC UNDER THE PLAIN LANGUAGE OF RATE CTC.

A. Rate CTC Is Not Ambiguous.

In arguing that Rate CTC should be construed in accord with ComEd's intent, ComEd contends that reference to its secret policy, which was prepared after Rate CTC was filed, is necessary to interpret the supposedly ambiguous language of the tariff. ComEd's position puts the cart before the horse by practically ignoring the question of whether the phrase "customer specific electric service contract" used in Rate CTC is even

ambiguous. Under the legal test that ComEd insists is applicable – and Illinois case law applying that test – it is clear that there is no ambiguity in the language at issue.

Under the legal test endorsed by ComEd, tariff language is ambiguous if it "'admit[s] of more than one reasonable interpretation.'" ComEd Br. at 20 (quoting Bloom Twp. High School v. Illinois Commerce Comm'n, 309 Ill. App. 3d 163, 174, 722 N.E.2d 676, 685 (1st Dist. 1999)). Other Illinois case law provides guidance in determining whether ambiguity exists under this standard. For example, the Illinois Supreme Court stated that statutory language is ambiguous "when it is capable of being understood by reasonably well-informed persons in two or more different senses."[1] People v. Jameson, 162 Ill.2d 282, 288, 642 N.E.2d 1207, 1210 (1994). Moreover, in interpreting a statute, the words used in the statute should be given their "popularly understood meaning." Denton v. Civil Service Comm'n, 176 Ill.2d 144, 149, 679 N.E.2d 1234, 1236 (1997). When a statute does not define a particular term, the court must rely on the term's "plain and ordinary meaning," and it can consult dictionary definitions to derive that meaning without rendering the term ambiguous. In re Bailey, 317 Ill. App. 3d 1072, 1086, 740 N.E.2d 1146, 1157 (1st Dist. 2000); see Denton, supra, 176 Ill.2d at 150, 679 N.E.2d at 1237 (consulting Black's Law Dictionary).

ComEd appears to put forward two reasons why Rate CTC is ambiguous: 1) the term "customer-specific electric service contract" is not defined in ComEd's tariffs

[1] According to ComEd, an ambiguous tariff is construed according to the same rules as an ambiguous statute. See ComEd Br. at 32; but see Secor Elevator Co. v. Illinois Power Co., ICC Dkt. No. 95-0410, 1997 Ill. PUC LEXIS 428, at *9 (July 30, 1997) (stating that tariffs are interpreted similarly to contracts) (attached hereto).

(ComEd Br. at 20); and 2) the term could have more than one reasonable interpretation. Id. Neither argument can withstand scrutiny, however.[2]

It is irrelevant that ComEd's tariff lacks a definition of "customer-specific electric service contract." As Ameritech Illinois argued in its opening brief (see Am. Ill. Br. at 15-17), the plain meaning of this term is obvious. Although ComEd excoriates Ameritech Illinois for "improperly" asking witnesses about the ordinary English meaning of the term "customer-specific electric service contract" (ComEd Br. at 29), such evidence of the popularly understood meaning of an undefined term is exactly what Illinois case law calls for. See Denton, supra, 176 Ill.2d at 149, 679 N.E.2d at 1236.[3] Moreover, accepting ComEd's position that the lack of definition for each term used in a tariff automatically renders the tariff ambiguous would mean that every ComEd tariff is ambiguous, because each tariff contains terms that are undefined. Indeed, it is a virtual certainty that the tariffs of every utility or carrier regulated by the Commission include terms that are not expressly defined. ComEd's position is absurd. As discussed above, the willingness of Illinois courts to rely on the popular and generally understood meaning of words, and even to consult dictionary definitions, demonstrates that a tariff need not define every term it uses to be unambiguous.

ComEd's second argument in favor of ambiguity similarly flies in the face of logic and Illinois precedent. ComEd argues that two interpretations of the term

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[2] ComEd attempts to muddy the waters by first presenting several pages of discussion about the "intent" of Rate CTC. See ComEd Br. at 17-19. Any discussion of so-called "intent" is beside the point if Rate CTC is not ambiguous.

[3] Even though Illinois and federal standards appear identical, ComEd criticizes Ameritech Illinois' citation of a federal case in its opening brief for the proposition that an undefined term in a tariff must take on its generally understood meaning. See ComEd Br. at 28.

"customer-specific electric service contract" are possible: Ameritech Illinois' "plain language" interpretation of the term, and ComEd's interpretation, based on the "specific purpose" (ComEd Br. at 19) for which the term was added to Rate CTC. That purpose allegedly was to bestow customer-specific CTCs only on certain large customers who had negotiated to pay rates that were less than ComEd's "base rates," but not on customers who had negotiated individualized non-price terms and conditions. Id.

It is highly unlikely that "reasonably well-informed persons" (see Jameson, supra, 162 Ill.2d at 288, 642 N.E.2d at 1210) would interpret the term "customer-specific electric service contract" in the manner ComEd proposes. The term has no obvious connection to the concept of base rates – let alone a reduction of those rates – so that a person reading that phrase in ComEd's tariff would not think of the specific purpose ComEd supposedly had in mind. The only way that someone might think to interpret the term in the manner ComEd proposes would be if he already were familiar with ComEd's secret policy. Such a person, however, would be far more than "reasonably well-informed"; he would have to be employed by ComEd's regulatory strategy group or its law department. ComEd's interpretation of "customer-specific electric service contract" is nothing more than a gambit to get the Commission to consider its secret policy before the Commission has even concluded that Rate CTC is ambiguous and that it thus may consider extrinsic matters like the secret policy. Indeed, ComEd's interpretation is not an "interpretation" at all but an attempt to carve out a broad exception to the plain meaning of the words used in Rate CTC.

Only one reasonable interpretation of the term "customer-specific electric service contract" is possible. That interpretation is based on the words used in Rate CTC, given their popular and generally understood meaning.[4] Rate CTC is not ambiguous.

B. The Agreement Between ComEd and Ameritech Illinois Is Customer-Specific.

There can be no doubt that the Agreement qualifies as a 'customer-specific electric service contract" under Rate CTC. ComEd's witness David Geraghty admitted that the Agreement was customer-specific under the ordinary meaning of those words. Tr. 329-30. ComEd recommends that Mr. Geraghty's testimony on this issue be read in context (see ComEd Br. at 29 n.8), so the colloquy is set forth in its entirety here:

> **Q. So if I just asked you the simple straightforward yes/no question, is this agreement customer-specific, is your answer yes or no?**
>
> A. I would say no.
>
> **Q. Okay. It's not customer-specific? Now it was negotiated between ComEd and Ameritech, right?**
>
> A. The contract was an agreement between the parties to provide for curtailment to facilities that otherwise would not have qualified for curtailment under the provisions of Rider 32.
>
> **Q. Okay. I don't think I heard an answer to the question. Let me try again. The agreement was it negotiated between Ameritech and ComEd?**
>
> A. I was not the person who worked on the agreement, so I'm not certain to what extent negotiation – the term negotiation is being implied.

[4] The Contract must be a "customer-specific electric service contract" even if that term is interpreted solely as it is used within the utility industry. See ComEd Br. at 28. The author of ComEd's secret policy interpreting Rate CTC could come up with no terminology to describe the Agreement (and comparable contracts involving Rider 30) other than as "customer-specific electric service contracts." See ComEd Cross Ex. 5, p. CE 0262.

Q. Was it agreed to between Ameritech and ComEd?

A. Both parties agreed to the agreement.

Q. Okay. Are there any other parties to the agreement?

A. Not that I'm aware of. I don't believe there are any other parties to the agreement.

Q. And does ComEd have any other contracts or agreements with other customers that have the same combination of prices, terms, and conditions as the agreement in this case?

A. ComEd does not have any other agreements that have the same combination of application of tariffs, such as Rates 6 and 6L, along with Rider 32.

Q. Okay. And, in fact, this agreement is the only agreement to which ComEd is a party with respect to which what would otherwise be Rate 6 customer locations can be paid for curtailment pursuant to the provisions of Rider 32, isn't that correct? There aren't any others of those?

A. This is the only agreement that ComEd has that has Rider 32 payments being applicable to Rate 6 customers.

Q. Okay. So, in that respect, would I be – would you agree that this unique – this kind of contract is, in fact, unique?

A. It's the one contract we have that is structured in that fashion –

Q. Okay.

A. -- if that's what you mean by unique.

Q. So it's the only one of its kind and ComEd and Ameritech are the only parties to it, but it's not customer-specific? That's your testimony?

A. I'm saying that it's not customer-specific in the sense of the relation used in Rate CTC with regard to calculating a customer-specific CTC.

Q. Okay. Is it customer-specific just in sort of common ordinary English?

A. It is specific between ComEd and Ameritech in the plain ordinary way that it is a contract that we have entered into.

Q. And Ameritech is the customer?

A. Correct.

Q. So it's customer-specific in plain ordinary English?

A. I guess you could say that.

Q. In fact, you have.

Tr. 327-30. Mr. Geraghty thus has admitted that, under the Illinois standard of "plain and ordinary meaning" (Bailey, 317 Ill. App. 3d at 1086, 740 N.E. 2d at 1157), the Agreement qualifies as "customer-specific."

ComEd responds to Ameritech Illinois' arguments largely by distorting them. ComEd's caricatures of Ameritech Illinois' position simply avoid the real issues.

For example, Ameritech Illinois argued that the Agreement is customer-specific because it was individually negotiated and varies materially from the terms and conditions of ComEd's tariffs. By way of emphasis, Ameritech Illinois noted that the Agreement is, in fact, entirely unique. See Am. Ill. Br. at 15-16. ComEd responds by arguing that, according to Ameritech Illinois' position, "the availability of customer specific CTCs would turn on the happenstance of whether ComEd had entered into a single contract of a particular type or whether any additional contracts were entered into with other customers." ComEd Br. at 26; see also id. at 4, 31-32. This is a gross distortion of Ameritech Illinois' position, which is simply that an individually negotiated

contract that varies materially from the terms and conditions of a carrier's tariffs is a "customer-specific" contract under any reasonable construction of that phrase. The fact that the Agreement in this case is unique makes that point even more obvious, but the status of any particular contract does not turn on that fact.[5]

Ameritech Illinois also relied upon the cross-examination of Mr. Geraghty set forth above, in which he conceded, among other things, that the Agreement addressed electric service and that the parties to that agreement were ComEd and Ameritech Illinois. Once again, ComEd rips these points out of their context in an effort to distort, rather than to respond to, Ameritech Illinois' position. ComEd claims:

> If Ameritech's contentions were correct, all of ComEd's contracts which are for "electric service" and which are with a single customer would be "customer specific electric service contracts" under the Rate. In fact, as Mr. Geraghty testified, if Ameritech's purported "ordinary English" approach were adopted, "thousands" of contracts that ComEd has with its Rate 6 and 6L customers could be construed to be "customer specific electric service contracts" and therefore entitled to customer specific CTCs.

ComEd Br. at 27. Once again, ComEd has distorted Ameritech Illinois' position. Virtually all of the contracts to which Mr. Geraghty referred in this passage are "tariff contracts"—brief form agreements that merely commit a customer to taking service under an identified rate or rider. These agreements are not individually negotiated, nor do they alter any of the material terms or conditions of the rates and riders to which they refer. See Tr. 354-56. For example, ComEd's Rider 32 contracts are one-page forms that

[5] For example, ComEd is a party to several contracts that make Rider 30-type curtailment payments available to certain customers that would not otherwise qualify for such payments. See Tr. 385-86. Since these contracts were individually negotiated and vary materially from the terms and conditions of Rider 30 (as well as other ComEd tariffs), they all are customer-specific contracts within the meaning of the Rate CTC tariff, even if they happen to be similar to each other.

simply commit the customer to taking service under Rider 32. See Am. Ill. Ex. 1.0, pp. 12-14 & Ex. 1.9. Ameritech Illinois has never asserted that these ordinary tariff contracts are customer-specific within the meaning of Rate CTC.

Ameritech Illinois also argued that, if ComEd intended that "customer specific electric service contract" be defined consistent with its secret policy, ComEd could have – and should have – incorporated that definition into the Rate CTC tariff. Am. Ill. Br. at 16. In response, ComEd states: "Rates cannot address each and every situation that will arise, especially circumstances that apply to only four of ComEd's millions of customers." ComEd Br. at 28. ComEd has distorted the scope of the issue.[6] ComEd drafted a provision in Rate CTC that, in its view, encompasses approximately 50 contracts that it considers "customer specific" within the meaning of the tariff. The issue in this case affects several additional contracts with four customers—all of which are large customers—and thus represents a significant addition to the total number of customer-specific contracts. Tr. 385-86, 388. Indeed, the treatment of these additional contracts was significant enough that ComEd anticipated a potential problem and, as a result, addressed it in its secret policy. Tr. 334; see ComEd Cross Ex. 5, p. CE 0262.

Moreover, ComEd did not leave the policy out of its tariffs as a matter of practicality, as ComEd's argument implies. Instead, Mr. Geraghty testified that ComEd

[6] ComEd also is arguing out of both sides of its mouth. On the previous page of its brief, ComEd asserts that, depending how the term "customer-specific electric service contract" is defined, it could encompass thousands of ComEd's contracts with its Rate 6 and 6L customers. Id. at 27. Given the importance to ComEd of including only what it views as the right type of customer-specific contracts under Rate CTC, the "correct and more thoughtful approach" (ComEd Br. at 29 n.8) would have been to include a definition of the term in the Rate CTC tariff. ComEd chose not to do so.

consciously decided to keep the policy confidential (and, a fortiori, not to include the policy in its tariffs) as a part of ComEd's "strategy" to discuss it with customers only "when they approached us" regarding their CTC calculations. Tr. 336-37. In other words, the whole idea was to keep customers in the dark – exactly the opposite of the purpose of publicly filed tariff.[7] ComEd did so to improve its negotiating position with customers considering alternative supply sources (Tr. 336), not because the inclusion of the Policy in the tariff would have been impractical.

The Agreement qualifies as a customer-specific contract. Ameritech Illinois thus is entitled to a customer-specific CTC under the plain language of Rate CTC.

II. THE COMMISSION SHOULD NOT CONSIDER COMED'S SECRET POLICY.

Because Rate CTC is not ambiguous, as Ameritech Illinois demonstrated in the previous section, the Commission has no need to consider ComEd's secret policy in interpreting the tariff. Assuming arguendo that the Commission determines that the tariff is ambiguous, there are good reasons why it should nonetheless refuse to consider the policy. The Commission's consideration of the policy would fly in the face of the filed rate doctrine and established canons of construction. Moreover, the policy's discussion of base rates is irrelevant to the Agreement.

[7] ComEd chafes at the description of its policy as "secret." See ComEd Br. at 32-33. Nevertheless, it produced the policy, which is identified as "PRIVILEGED AND CONFIDENTIAL," to Ameritech Illinois only pursuant to a protective order and only in severely bowdlerized form. See ComEd Cross Ex. 5.

A. Consideration of the Policy Would Violate the Filed Rate Doctrine and the Public Utilities Act.

Ameritech Illinois argued in its opening brief that consideration of the secret policy would violate the filed rate doctrine, as embodied in the Public Utilities Act, 220 ILCS 5/9-240, 5/9-241 ("PUA"). Such a violation would occur because the policy creates a deviation from the terms of ComEd's published tariff and because ComEd's failure to disclose the policy to the public violates § 9-102 of the PUA. See Am. Ill. Br. at 19-22.

ComEd responds in two ways. First, it asserts that consideration of utility policy or intent is an appropriate method of tariff interpretation and that the particular policy at issue here does not involve a modification of its published rates. See ComEd Br. at 30. Second, it asserts that Ameritech Illinois bases its position on a definition of "rate" found in cases construing "irrelevant federal statutes" and inapplicable sections of the PUA. Id. at 25-26. Neither argument is correct.

ComEd argues throughout its brief that, based on the holdings in two cases,[8] it can introduce its secret policy to guide interpretation of Rate CTC. See ComEd Br. at 3, 17-18, 21-23, 31, 32. Putting aside the correctness of ComEd's interpretation of these cases (which is discussed in Section II.B, infra), ComEd's position is that it should be allowed to alter fundamentally the meaning of language used in its tariff in the name of "clarifying" its intent. As discussed above, ComEd's policy carves out a substantial

[8] The cases are Moncada v. Illinois Commerce Comm'n, 212 Ill. App. 3d 1046, 571 N.E.2d 1004 (1st Dist. 1991), and General Mills, Inc. v. Illinois Commerce Comm'n, 201 Ill. App. 3d 715, 559 N.E.2d 225 (1st Dist. 1990).

exception to the term "customer-specific electric service contract" in a way not at all obvious from (and in fact contrary to) the language of Rate CTC. Given ComEd's position that any term left undefined in its tariffs must be ambiguous (see ComEd Br. at 20) and is subject to interpretation through extrinsic evidence, it apparently believes that it could introduce a secret policy clarifying that its use of the undefined term "white" in a tariff actually means "black" and that such a method of interpretation would not violate the filed rate doctrine or the PUA.

In fact, the United States Supreme Court and Seventh Circuit decisions that ComEd brands as "irrelevant" make clear that a utility cannot deviate from the express terms of its tariff to give certain customers a different deal. See American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 221-22 (1998) ("Central Office"); Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7th Cir. 1998). The PUA similarly requires that a utility charge the rate specified in its filed tariff (220 ILCS 5/9-240) and prohibits it from discriminating in its rates. See 220 ILCS 5/9-241; see also Maurice Transport Co. v. Amoco Oil Co., 144 Ill. App. 3d 156, 162, 494 N.E.2d 738, 742 (4th Dist. 1986) (holding that contractual requirement is enforceable only if it is included in tariff). As a result, the Commission should not allow ComEd to use materials outside the tariff to change the tariff's language and thus to justify treating some customers more favorably than others.

Moreover, the secret nature of ComEd's policy on Rate CTC confirms the relevance of Citizens Utility Board v. Illinois Commerce Comm'n, 275 Ill. App. 3d 329,

655 N.E.2d 961 (1st Dist. 1995) ("CUB"). The relevant issue from CUB is not, as ComEd suggests, simply whether the rate at issue gives the utility unlimited discretion.[9] See ComEd Br. at 30. The issue instead is whether § 9-102 of the PUA requires disclosure of ComEd's secret policy because the policy is a rule or regulation that "affect[s] the rates charged or to be charged" pursuant to Rate CTC. 220 ILCS 5/9-102. The policy unquestionably affects the rates charged to Ameritech Illinois and many other customers because it delineates which customers with which ComEd has written contracts actually have "customer-specific electric service contracts" under Rate CTC. ComEd admits that it kept the policy confidential as part of a strategy to improve its negotiating position with customers considering alternative energy suppliers. Tr. 336-37. The Commission's consideration of the policy here would reinforce ComEd in its strategy of withholding important rate information from its customers and the public.

This conclusion is unaffected by the Commission's decision in CGH Medical Center v. Commonwealth Edison Co., ICC Dkt. No. 96-0086, 1998 Ill. PUC LEXIS 46 (Jan. 22, 1998) (attached to Ameritech Illinois' Opening Brief). The customer there argued that it was the Commission's Proposed Order, rather than ComEd's tariff, that ran afoul of CUB. See CGH, 1998 Ill. PUC LEXIS at *19. In fact, the tariff at issue there – rather than some separate "clarifying" ComEd policy – contained the requirements for self-generation and displacement that the Commission was interpreting (see id. at *2-4), and the Commission based its decision on the "plain language" of the tariff, rather than

[9] Despite what ComEd suggests (ComEd Br. at 30), Rate CTC does give it great discretion in determining what constitutes a "customer-specific electric service contract." This is clear from ComEd's own arguments. On the one hand, ComEd states that the term could encompass thousands of contracts. Id. at 27. On the other hand, as "clarified" by ComEd through its policy, the term would apply only to about 50 customers. See ComEd Ex. 3.0, p. 14. A utility is required to act reasonably in exercising discretion granted under the terms of a tariff. See Bloom Twp., supra, 309 Ill. App. 3d at 175, 722 N.E.2d at 686.

turning to a written ComEd policy to resolve an ambiguity in the tariff language. Id. at *21. CGH thus provides no justification for ignoring the holding of CUB and consulting ComEd's secret policy on Rate CTC.

B. Consideration of the Secret Policy Would Violate Canons of Construction.

Ameritech Illinois also argued in its opening brief that various well-established canons of construction counseled against consideration of ComEd's secret policy. In particular, those canons suggest that an ambiguous tariff should be construed against its drafter; that a tariff should be construed to avoid an absurd result, such as giving it a meaning inconsistent with language used; and that the unilateral construction placed on the tariff by its drafter is not binding. See Am. Ill. Br. at 22-24. Although ComEd disputes each of these arguments (see ComEd Br. at 31-32), its positions have no merit and form no basis for considering its secret policy.

In arguing that an ambiguous tariff should not be strictly construed against the drafter, but according to its intended meaning, ComEd relies on General Mills, Inc. v. Illinois Commerce Comm'n, 201 Ill. App. 3d 715, 559 N.E.2d 225 (1st Dist. 1990). See ComEd Br. at 31.[10] ComEd's reasoning has several flaws.

[10] ComEd sometimes cites Moncada v. Illinois Commerce Comm'n, 212 Ill. App. 3d 1046, 571 N.E.2d 1004 (1st Dist. 1991), for the same proposition. See ComEd Br. at 3, 17-18, 21-22. Moncada relies on General Mills (see 212 Ill. App. 3d at 1053, 571 N.E.2d at 1009) and must be construed similarly.

First, the General Mills decision relies, in turn, on a federal case, Penn Central Co. v. General Mills, Inc., 439 F.2d 1338, 1341 (8th Cir. 1971),[11] for the proposition upon which ComEd relies. However, neither ComEd nor the Illinois court in General Mills presents a complete discussion of this aspect of the Penn Central decision. In fact, the Penn Central court states that strict construction of a tariff against its drafter is not required only when there is "a permissible and reasonable construction which confirms to the intentions of the framers of the tariff, avoids possible violations of the law, and accords with the practical application given by shippers and carriers alike." 439 F.2d at 1341. Assuming arguendo that the construction of "customer-specific electric service contract" propounded in ComEd's secret policy is "permissible and reasonable," ComEd's construction of Rate CTC does not fulfill the remainder of the Penn Central standard. The construction violates the filed rate doctrine and the PUA, as discussed in the preceding section. There also is nothing in the record showing that this construction comports with "the practical application" given Rate CTC by ComEd's customers – who were unaware of ComEd's policy, given its secret status.

Second, ComEd makes only a weak attempt to rebut Ameritech Illinois' earlier explanation of why General Mills is inapplicable here. The tariffs at issue in both General Mills and Moncada were written in a particular fashion to comply with earlier Commission orders. See General Mills, 201 Ill. App. 3d at 718, 559 N.E.2d at 227; Moncada, 212 Ill. App. 3d at 1048, 571 N.E. 2d at 1006. ComEd has pointed to nothing in the record showing that it included the term "customer-specific electric service contract" in Rate CTC to comply with a Commission order. To the contrary, the parties

[11] Later in its brief, ComEd suggests that Penn Central provides the incorrect legal standard on another important issue. See ComEd Br. at 32.

agree that the Rate Relief Law permits ComEd to make customer-specific CTCs available, via tariff, beyond the minimum requirements of 220 ILCS 5/16-108(g). See ComEd Ex. 3.0, p. 13 (Geraghty); ComEd Ex. 4.0, p. 4 (Crumrine); Am. Ill. Ex. 1.1, p. 6 (Ragland). Moreover, ComEd does not refute Ameritech Illinois' argument that the secret policy cannot represent the "intent of the framers" of Rate CTC. The framers of Rate CTC did not consider the types of contracts ComEd had with customers in drafting the tariff, so they could not have had any intent regarding contracts like the Agreement. Tr. 382. In fact, Mr. Geraghty testified that the tariff was drafted and filed with the Commission "much earlier in the year" than when the policy was drafted. Tr. 381. The policy is only post hoc rationalization, not evidence of intent.

Third, ComEd makes no attempt to reconcile the General Mills holding with the decisions Ameritech Illinois cited in its opening brief (see Am. Ill. Br. at 22). Those cases unequivocally state that, when the interpretation of an ambiguous tariff is at issue, the tariff should be construed against the drafter, since it could have used the "language necessary to protect its interest." Indiana Harbor Belt R.R. Co. v. Budd Co., 110 Ill. App. 3d 76, 79, 441 N.E.2d 1301, 1304 (1st Dist. 1982); see Maurice Transport, supra, 144 Ill. App. 3d at 162, 494 N.E.2d at 742. The Commission should construe any ambiguity in Rate CTC against ComEd.

Finally, ComEd chastises Ameritech Illinois for suggesting that a tariff should be construed like a contract. See ComEd Br. at 32. ComEd's position ignores Commission precedent that expressly approves of such a construction:

> Because a tariff is simply a contract of general applicability that is offered to anyone qualified to take thereunder, tariff interpretation must be done in a manner similar to the interpretation of contracts at common law. Under the common law, ambiguous contracts may be interpreted by relying upon any of the several rules of interpretation, while unambiguous contracts must be enforced as written.

Secor Elevator Co. v. Illinois Power Co., ICC Dkt. No. 95-0410, 1997 Ill. PUC LEXIS 428, at *9 (July 30, 1997) (emphasis added) (attached hereto). Moreover, the court in Bloom Township – which ComEd touts as providing the "correct standard" for tariff interpretation on another issue (see ComEd Br. at 20 n.5) – applies contract interpretation principles to construe ComEd's Rider 30. See Bloom Twp., supra, 309 Ill. App. 3d at 175, 722 N.E.2d at 686.

As Ameritech Illinois explained in its opening brief (Am. Ill. Br. at 23-24), it is a well-established principle of contract construction that one party's unilateral interpretation of a contract provision is irrelevant. See, e.g., Klemp v. Hergott Group, Inc., 267 Ill. App. 3d 574, 582, 641 N.E.2d 957, 963 (1st Dist. 1994). The Commission should follow this principle and ignore ComEd's secret policy.

C. ComEd Misapplies the Rate Relief Law in Arguing the Policy Applies.

ComEd contends that its secret policy is relevant because the policy correctly interprets the definition of "base rate" in § 16-102 of the Rate Relief Law, 220 ILCS 5/16-102, and it takes great pains to argue that, because Ameritech Illinois supposedly pays "base rates" under the policy, it is not entitled to a customer-specific CTC. See ComEd Br. at 23-26. It also argues that payments made pursuant to Rider 32 do not

qualify as "base rates." ComEd, however, interprets the term "base rate" in a crabbed and misleading manner.

As an initial matter, Ameritech Illinois does not even pay a "base rate" as § 16-102 defines that term. The definition specifically excludes "special or negotiated contract rates" from being "base rates." 220 ILCS 5/16-102. Ameritech Illinois pays ComEd pursuant to a specially negotiated contract, so it must be paying something other than ComEd's base rates. Accordingly, any discussion in the secret policy about the unavailability of customer-specific CTCs to customers paying "base rates" is irrelevant.

Section 16-102's definition of "transition charge" also requires that they be based on "contract rates," rather than base rates, "to the extent applicable." 220 ILCS 5/16-102. Since Ameritech Illinois is paying a contract rate, that contract rate should be used to calculate its transition charge. ComEd, however, ignores this language in § 16-102 and argues that Ameritech Illinois' transition charge should be calculated pursuant to "the base rates in effect on October 1, 1996." ComEd Br. at 24 (quoting part of "transition charge" definition in § 16-102). It asserts that the "base rate" paid by Ameritech Illinois thus should not take into account curtailment payments made pursuant to Rider 32. This position is incorrect.

First, ComEd relies solely on the "base rate" definition in § 16-102 and argues that the broad definition of "rate" found in other parts of the PUA or in federal cases is "irrelevant." See ComEd Br. at 25. ComEd's willingness to toss inconvenient U.S.

Supreme Court precedent and the rest of the PUA into the dustbin of irrelevancy is astounding. Nevertheless, ComEd's position ignores the fact that the § 16-102 definition of "base rates" itself uses the term "rates"[12] – so that, in seeking to interpret "base rates," the Commission may appropriately consult the definition of "rates" in § 3-116 of the PUA, 220 ILCS 5/3-116, and the precedent cited by Ameritech Illinois. See Am. Ill. Br. at 25-26. Those authorities define the term "rate" broadly to include both the price and non-price elements of the parties' deal. See, e.g., Central Office, supra, 524 U.S. at 223. "Rates, . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." Id. The Supreme Court's exposition of this principle is universal in its application. Indeed, Illinois courts have held that "rates" under § 3-116 include tariffs under which the utility provides credits or payments to its customers. See, e.g., Bloom Twp., supra, 309 Ill. App. 3d at 175, 722 N.E.2d at 686 (holding that ComEd's Rider 30 curtailment tariff qualifies as "rate"). ComEd makes no meaningful attempt to distinguish these federal and Illinois cases, and it cannot do so.[13]

Second, ComEd argues that Rider 32 does not qualify as a "base rate" because it was not '"identified in a rate order for collection of the electric utility's base rate revenue requirement.'" ComEd Br. at 25 (quoting 220 ILCS 5/16-102). ComEd cites nothing in the record supporting this assertion, so the Commission should disregard it.

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[12] See 220 ILCS 5/16-102 (defining base rates as "the rates for" certain types of tariffed services).

[13] In the damages section of its brief, ComEd also argues that curtailment payments should not be considered in calculating CTCs because such payments do not affect "base rates." ComEd Br. at 46. This argument is incorrect for the reasons discussed here. See also Am. Ill. Br. at 33-34.

Third, ComEd argues that Ameritech Illinois cannot be paying a "base rate" under § 16-102 because Rider 32 supposedly was not in effect until after October 1, 1996, and thus does not qualify as a "base rate" under the definition of "transition charge" in § 16-102. ComEd Br. at 25. The very evidence ComEd cites as support for Rider 32's effective date undermines its argument. ComEd cites to Sheet 95.09.6 of Rider 32 (Jt. Ex. 3), which does have an effective date of December 9, 1996. This sheet is the first page of Rider 32 and is identified as the "2nd Revised Sheet." Most of the other pages of Rider 32 are identified either as the "Original Sheet" or the "1st Revised Sheet," and each has an effective date of September 6, 1996. See Jt. Ex. 3, sheets 95.09.8 – 95.09.9.2. It is thus clear that Rider 32, in general, and Sheet 95.09.6, in particular, were in effect prior to October 1, 1996.

Because Ameritech Illinois is paying something other than ComEd's "base rates" under the Agreement, ComEd's secret policy discussing the relationship between Rate CTC and base rates is irrelevant. The Agreement is a "customer-specific electric service contract" under Rate CTC, and Ameritech Illinois therefore is entitled to customer-specific CTCs for facilities served under it.

III. AMERITECH ILLINOIS HAS PROVIDED A REASONABLE BASIS TO CALCULATE DAMAGES FOR 126 FACILITIES, WITHOUT ANY REDUCTION FOR CURTAILMENT PAYMENTS.

ComEd's arguments against Ameritech Illinois' damages claim also are unconvincing. ComEd distorts the record in multiple ways, attempts to rely on material that is not in the record, and ignores the relevant standard under Illinois law. In fact, the record establishes that Ameritech Illinois should not be required to refund curtailment

payments to ComEd, that the Agreement covered 126 facilities, and that Ameritech Illinois' damages should be based on the optimal choice between bundled and unbundled rates for each facility.

A. Ameritech Illinois Would Not Breach The Agreement as a Delivery Services Customer.

The primary argument that ComEd makes in opposition to Ameritech Illinois' damages claim is that Ameritech Illinois supposedly would have to breach the Agreement if it became a delivery services customer. It thus would be obligated to repay ComEd for approximately $847,000 in curtailment payments. See ComEd Br. at 34-37. If Ameritech Illinois has no repayment obligation, however, ComEd's own calculations show that Ameritech Illinois would be entitled to damages ranging from at least $252,000 to $603,000, depending on the number of facilities covered by the Agreement. See id. at 45-46.

ComEd's argument ignores the fundamental purpose of the Agreement: to permit the combination of portions of various ComEd tariffs that otherwise could not be combined. The express terms of Rider 32 make it available only to Rate 6L customers and Rider CB participants. See Jt. Ex. 3, sheet 95.09.6. Nevertheless, because of the Agreement, Ameritech Illinois facilities that are not covered by Rate 6L or Rider CB became eligible to receive curtailment payments under Rider 32. Any supposed incompatibility between Rider 32 and other ComEd tariffs simply is irrelevant because the Agreement allows Ameritech Illinois to combine curtailment payments under Rider

32 "and any other applicable rates, riders or tariffs . . . on file with the Illinois Commerce Commission." Jt. Ex. 1, ¶ 1.3.

In addition, ComEd's arguments about why Ameritech Illinois would have to breach the Agreement are based on distorted readings of the record. First, ComEd misinterprets the testimony of Ameritech Illinois' consultant about the relationship between Rider 32 and Rider PPO. Second, it misconstrues the language of the Agreement addressing which tariffs are applicable.

As proof that Ameritech Illinois would have to breach the Agreement if it became a delivery services customer, ComEd cites the testimony of John Ragland that Rider 32 and Rider PPO could not be "paired." Tr. 171; see ComEd Br. at 35. But the cited testimony does not, as ComEd claims, prove that Ameritech Illinois would violate the Agreement if it took service under Rider PPO. Ameritech Illinois is not a Rider 32 customer. In fact, far from conceding ComEd's point, Mr. Ragland explicitly testified that Ameritech Illinois was not taking service under Rider 32. See Am. Ill. Ex. 1.0, p. 12. As Ameritech Illinois explained in its opening brief (Am. Ill. Br. at 6-7), the Agreement differs from Rider 32 in material ways. ComEd's witness, Mr. Geraghty, agreed that there were material differences between the Agreement and Rider 32. Tr. 339-41, 352-54. Indeed, ComEd's Answer refused to admit that the Agreement was a Rider 32 contract, stating that the Agreement "does not characterize itself as being a 'Rider 32' contract or as not being a Rider 32 contract." ComEd Answer, p. 16. Because the

Agreement is not a Rider 32 contract, any supposed incompatibility between that rider and Rider PPO is irrelevant.[14]

ComEd's other argument is that the use of the conjunction "and" in § 1.3 of the Agreement precludes Ameritech Illinois from taking service under Rider PPO without being in breach. Section 1.3 lists various tariffs and documents under which Ameritech Illinois agrees to take service:

> Customer will receive and pay for electric service under (i) this Contract, (ii) Rate 6 or 6L, as applicable, (iii) Rider 32, (iv) Riders No. 6 (attached as Exhibit B), 7 (attached as Exhibit C), 16, 20, 23, 25 (if it is applicable to an individual Premises), 28 and 31, (v) Terms and Conditions, and (vi) any other applicable rates, riders or tariffs, in each case as the items in clauses (i) – (vi) are on file with the Illinois Commerce Commission from time to time and as the same may be added, deleted, modified or amended from time to time.

Jt. Ex. 1, § 1.3(a). ComEd appears to argue that the use of "and" before the catch-all provision in clause (vi) means that Ameritech Illinois must take service under all of the listed tariffs, at the same time, or else it will be in breach of the Agreement. ComEd Br. at 36-37.[15]

ComEd's position is belied by the terms of the Agreement. First, the original list of facilities attached to the Agreement identifies the facilities served and the rates and

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[14] ComEd's amendment of certain tariffs, but not Rider 32, when its delivery services tariffs took effect (see ComEd Br. at 35) is equally irrelevant. ComEd did not amend Rider 32 to include Rate 6 customers, even though the Agreement made Rider 32 applicable to Rate 6 facilities.

More importantly, the Commission should not consider ComEd's assertions about the contents, or alleged amendment, of its Riders 8, 9 and 11 because it failed to put those materials into evidence. See Consolidated Communications Consultant Services, Inc. v. Illinois Bell Telephone Co., ICC Dkt. No. 99-0429, 2001 Ill. PUC LEXIS 568, at *46 n.19 (June 14, 2001).

[15] An exception to this "all or nothing" view would be where § 1.3 includes the caveat "as applicable" regarding a particular tariff.

riders applicable to each. Many of the listed facilities are served under Rate 6T. See Jt. Ex. 1, Exhibit A. Because this rate is not listed in § 1.3, the only way these facilities could be included in the Agreement is if the provision quoted above did not require each listed tariff to be applicable to each facility. Similarly, the only riders listed in Exhibit A as applicable to any facility are Riders 6, 7, and 25. See Jt. Ex. 1, Exhibit A. If ComEd's "all or nothing" position were accurate, Ameritech Illinois would have been in breach of the Agreement from the beginning since no facilities were taking service under various other riders listed in § 1.3(iv). The Commission should instead interpret § 1.3 to allow Ameritech Illinois to take service under Rider 32 "and" any other relevant ComEd tariff, just as the Agreement provides.

B. Ameritech Illinois' Optimization Theory Accurately Reflects Its Actual Damages.

ComEd's arguments against the "optimization" theory of damages (see ComEd Br. at 47-48) involve a distortion of Ameritech Illinois' position and should be rejected. During the hearing, Ameritech Illinois did agree that, if a particular facility were removed from the coverage of the Agreement, the company could no longer rely on the Agreement to obtain a customer-specific CTC for that facility. Tr. 184. However, as explained above (see Section III.A, supra), Ameritech Illinois would not breach the Agreement by simply switching a particular facility from bundled service to Rider PPO. The facility would still be taking service from ComEd as required by § 1.1(d) of the Agreement, and thus would not breach the Agreement by doing so.

ComEd's other argument against optimization relates to the minimum amount of time a customer switching from ComEd's delivery service must remain on bundled service. See ComEd Br. at 48. The basis for that argument is a particular page from ComEd's tariff for Rate RCDS, which is not in the record. The Commission therefore should not consider it. See Consolidated Communications Consultant Services, Inc. v. Illinois Bell Telephone Co., ICC Dkt. No. 99-0429, 2001 Ill. PUC LEXIS 568, at *46 n.19 (June 14, 2001).[16]

C. The Agreement Covered 126 Facilities.

The parties have the starkest factual disagreement about the number of facilities covered by the Agreement. In its opening brief (Am. Ill. Br. at 35-37), Ameritech Illinois explained why the Commission should conclude that the number of covered facilities expanded to 126 when John Ragland sent ComEd a new list in November 1999. ComEd's opposing arguments represent an exercise in wishful thinking, rather than a credible justification for its position.

First, ComEd claims that Ameritech Illinois' position is implausible, because it would have "radically altered" its "clear pattern" had it notified ComEd about covered facilities in November 1999, rather than in the spring of the year. ComEd Br. at 38. However, ComEd bases this "clear pattern" on only a two-year track record (spring 1998 and 1999) and ignores Ameritech Illinois' actions during the next two years, when it did

[16] In any event, the cited tariff page appears to lock a customer into bundled service only for a 12-month period. There is no evidence in the record that this length of time would be incompatible with the periodic changes in rates that occurred under Rider PPO.

not contact ComEd about covered facilities in the spring. Moreover, ComEd fails to take into account two probable explanations for the supposedly radical alteration in Ameritech Illinois' conduct: ComEd's Rate CTC tariff went into effect in the fall of 1999 (see Jt. Ex. 2), and Johnson Controls switched the personnel responsible for this aspect of the Ameritech Illinois account in the summer of 1999. See Tr. 206.

Second, ComEd makes no attempt to explain the inconsistencies in the testimony of Delso Hudson, its primary witness on the facilities issue. Mr. Hudson testified that he asked Mr. Ragland in June 1999 for a list of Ameritech Illinois facilities, because he had just become manager of the Ameritech Illinois account and wanted to learn what its most important facilities were. ComEd Ex. 5.0, pp. 1-2. Mr. Hudson was apparently untroubled, however, that Mr. Ragland took five months – until November 1999 – to respond to his request. See id., p. 2. Similarly, ComEd (and Mr. Hudson) do not explain why it was necessary to ask Mr. Ragland which Ameritech Illinois facilities had high demand (id.), when ComEd would have had the best access to usage information. Finally, ComEd makes no attempt to explain the discrepancy between its position that the Agreement covered only 51 facilities (ComEd Br. at 37) and Mr. Hudson's testimony that the list attached to his testimony "identifies the specific locations that are covered by 'Rider 32' and that are part of the Contract." ComEd Ex. 5.0, p. 3. That list identifies only 31 facilities with a Rider 32 designation. Although Mr. Hudson admits that he added information to the list Mr. Ragland provided (ComEd Ex. 5.0, p. 2; see also Tr. 224-25), he apparently could not take the trouble to ensure that it reflected the correct information about which facilities were covered by which riders.

Each party presented the evidence in its possession regarding the number of facilities covered by the Agreement. Mr. Ragland testified in detail about how he prepared the list of 126 facilities on behalf of Ameritech Illinois and sent it to Mr. Hudson at ComEd. Tr. 55-58. Ameritech Illinois's position does not have the discrepancies found in Mr. Hudson's testimony and thus is more credible. The Commission should find that the Agreement covered 126 facilities as of November 1999.

D. Ameritech Illinois' Damages Presentation Meets the Requirements of Illinois Law.

As a final argument in support of its damages calculation, ComEd points out that it presented a more detailed calculation than Ameritech Illinois did. See ComEd Br. at 43-45.[17] Ameritech Illinois, however, never obtained sufficient information from ComEd through discovery to allow it to present precise information in support of its damages. As Ameritech Illinois explained in its opening brief (Am. Ill. Br. at 28; see Am. Ill. Ex. 1.1, p. 19), ComEd did not provide detailed billing data for all the facilities covered under the Agreement; it only provided such data for one facility. Ameritech Illinois thus did not have enough information to generate the "comprehensive analysis" that ComEd demands. ComEd Br. at 45.

[17] ComEd also suggests that Ameritech Illinois' estimate of its damages is less credible because the estimate became smaller during the course of the case. See ComEd Br. at 42-43. It seems odd for a defendant to complain that its potential liability diminished as the parties refined their cases through the discovery process.

In any event, Ameritech Illinois has identified its damages sufficiently under Illinois law. The burden on Ameritech Illinois here simply is to establish that it sustained damages and to provide "a reasonable basis for computing those damages." C-B Realty & Trading Corp. v. Chicago & Northwestern Ry. Co., 289 Ill. App. 3d 892, 901, 682 N.E.2d 1136, 1143 (1st Dist. 1997). Ameritech Illinois has shown that it paid more for electricity than it would have if ComEd had provided it with customer-specific CTCs, and it has explained a methodology through which its damages should be computed. Nothing further is required, and ComEd has all of the information needed to perform the appropriate calculations. The Commission should order ComEd to perform the calculations necessary to determine the precise amount of Ameritech Illinois' damages.

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CONCLUSION

For all the foregoing reasons and for the reasons stated in its opening brief, Ameritech Illinois requests that the Commission find that ComEd has violated §§ 9-240, 9-241, 9-250, and 9-252 of the Public Utilities Act. The Commission should order ComEd to provide customer-specific CTCs for the 126 facilities covered under the Agreement, to perform the calculations necessary to calculate Ameritech Illinois' damages for each facility, and to provide credits based on those calculations.

Respectfully submitted,

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